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No. 77-1651

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE YOUNGSTOWN CARTAGE CO., PETITIONER

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

MARK L. EVANS,
General Counsel,

FREDERICK W. READ, III,
Associate General Counsel,

L. MARIE GUILLORY,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 571 F.2d 1243. The orders of the Interstate Commerce Commission (Pet. App. 7a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1978. The petition for a writ of

certiorari was filed on May 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Interstate Commerce Commission lawfully denied petitioner's applications for additional motor carrier operating authority.

STATEMENT

In early 1974 the Interstate Commerce Commission adopted regulations designed to create more efficient interstate trucking services without unduly upsetting the motor carrier regulatory scheme. Under what was termed the "gateway elimination" policy, the Commission agreed to consider applications from trucking companies for direct service authorizations between points that the companies had previously served only indirectly.[1] *Gateway Elimination Decision*, 119 M.C.C. 530. 49 C.F.R. 1065.1.

Under the previous practice, when carriers were not authorized to provide direct service between two points they could provide indirect service by "tacking" their authorized routes together through what were termed "gateway" points. For example, if a carrier were authorized to provide service from Pittsburgh to Cincinnati and from Cincinnati to Indianapolis, it could provide service from Pittsburgh to Indianapolis

[1] This Court upheld the gateway elimination rules in *Thompson Van Lines, Inc.* v. *United States*, 399 F. Supp. 1131 (D. D.C.), affirmed, 423 U.S. 1041.

by "tacking" the two routes together. But the carrier would still be required to follow its authorized routes to and from the "gateway" point—in this example, Cincinnati—rather than shipping by the most direct overland route (Pet. App. 2a-3a).

Under the new policy, the Commission permitted qualifying carriers to eliminate the need to pass through the "gateway" points. Where the length of the direct route between two points was more than 80 percent of the length of the indirect route through the carrier's gateway, the carrier could eliminate the gateway simply by filing a notice of intention to do so. 49 C.F.R. 1065.1(d)(1)(i). Where the gateway route was more circuitous—and where it was therefore less likely that the carrier had previously provided significant service between the two points—the carrier was required to file a special application for elimination of the gateway. This application was required to show that the carrier had been handling traffic between the two points via the gateway during the two years preceding November 23, 1973. 49 C.F.R. 1065.1(d)(2)(iii). If the carrier did not eliminate particular gateways by one of these two methods, the regulations provided that "tacking" would no longer be permitted, and the carrier would be prohibited from continuing to offer indirect service through its gateways. 49 C.F.R. 1065.1(b).

Petitioner, an interstate trucking company, filed an application to eliminate 14 of its gateways that involved circuity of more than 20 percent and therefore could not be eliminated without the special showing

required by the regulations. The Commission denied petitioner's application on procedural grounds (Pet. App. 7a-8a). The Commission stated that petitioner's evidence (an exhibit listing some 800 random shipments from the previous two years) failed to specify the gateway through which each shipment had moved. Moreover, the Commission noted that petitioner's application had failed to distinguish between shipments on routes having less than 20 percent circuity (and thus subject to gateway elimination simply upon filing a letter notice) and those on more circuitous routes. In light of petitioner's "failure to present its traffic exhibit in such a way as to enable the Commission to determine that it has been a substantial competitor through each of the involved gateways" (Pet. App. 8a), and because the traffic exhibit was "unworkable" (*ibid.*), the Commission denied the application.

On January 21, 1976, one day before the Commission's final decision in the first proceeding became effective, petitioner filed a second application, substantially identical to the first, in which it attempted to remedy the evidentiary deficiencies of the prior application. Although the second application purported also to be filed under the Commission's gateway rules, the Commission held that it was untimely under those rules (Pet. App. 11a-12a).[2] Treating the application

[2] The gateway regulations required applications for eliminating gateways involving more than 20 percent circuity to be filed within 60 days of April 5, 1974, the date the order promulgating the regulations became effective. 39 Fed. Reg. 7794; 49 C.F.R. 1065.1(d)(2)(iv). All unapproved operations through gateways were prohibited after that date. 49 C.F.R. 1065.1(b). The gateway regulations also barred duplicate applications. 49 C.F.R. 1065.1(e).

as a traditional request for new operating authority under Section 207(a) of the Interstate Commerce Act, as added, 49 Stat. 551, 49 U.S.C. 307(a), the Commission denied the application because petitioner failed to offer proof of shipper support for the requested routes (Pet. App. 13a-15a).

The court of appeals affirmed both of the Commission's orders, finding that the Commission had lawfully exercised its discretion in denying the applications (Pet. App. 1a-6a). As to the denial of the 1974 application, the court held that the Commission "was not unreasonable in requiring that the applicant meet the minimal procedural burden put on the carriers in order to help the agency with the formidable administrative burden of the gateway elimination program, particularly in view of the benefits that program conferred on the carriers" (Pet. App. 3a). With respect to the denial of the 1976 application, the court concluded that because that application had been filed at a time when petitioner's tacking authority was about to expire and because the Commission rules barred duplicate gateway elimination applications, the Commission had not acted in an arbitrary or capricious manner in treating the application as a request for new authority and imposing the normal requirement of proof of shipper support for the requested routes rather than the more lenient proof requirements applicable in gateway elimination proceedings.

ARGUMENT

The gateway elimination rules involved in this case governed only applications filed before 1975. The case therefore does not present any issue of continuing importance requiring this Court's review. Moreover, the decisions of the Commission and the court of appeals are correct.

1. The court of appeals properly sustained the Commission's denial, on procedural grounds, of petitioner's failure to indicate which shipments in its 800 shipment sample moved through which gateways made its application almost worthless, because the Commission could not determine whether petitioner had been a substantial competitor in each of the markets in question, and thus whether elimination of the gateway would serve the purpose of curbing wasteful circuity without allowing a new carrier into a market that it had not previously served. The requirement that a carrier show that it had been a substantial competitor between the two points through its gateway connection was a traditional one, *Childress—Elimination Sanford Gateway*, 61 M.C.C. 421, and the agency's denial of the application for failure to meet that standard was entirely reasonable.[3]

[3] *Chem-Haulers, Inc.* v. *Interstate Commerce Commission*, 565 F.2d 728 (C.A. D.C.), on which petitioner relies, is inapposite. In that case the Commission granted portions of a gateway elimination application but denied other portions on the ground that the applicant had not transported "substantial" traffic through certain gateways. The court reversed because of the Commission's failure to explain what constituted "substantial" traffic. *Id.* at 732. In the present case, by contrast, the Commission was precluded from making any findings regarding the substantiality of traffic through petitioner's gateways because of the inadequacy of petitioner's evidentiary presentation. (In any event, any conflict among decisions of the same court of appeals would be for that court to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902.)

2. The Commission's refusal to consider petitioner's second application under its gateway rules and its denial of the application as a request for new authority also were proper. Because petitioner's second application was filed approximately 18 months after the published deadline for filing gateway elimination applications, the Commission was entirely justified in declining to process it under the special 1974 gateway elimination procedures.[4]

Petitioner submitted no shipper support evidence or any other evidence sufficient to make out a *prima facie* case for a grant of new authority, see *Novak Contract Carrier Application*, 103 M.C.C. 555, and the Commission therefore acted within its discretion in denying the 1976 application. See *Ross Express*,

[4] There is no basis for petitioner's assertion that the court of appeals' decision is inconsistent with *Frozen Food Express, Inc.* v. *United States*, 535 F.2d 877 (C.A. 5). In that case the Commission refused to reopen a gateway elimination application to consider additional evidence submitted by the complaining carrier, although it had accepted late-filed evidence from other carriers. The court vacated the Commission's order on the ground that the carrier whose evidence was not considered had not received "evenhanded" treatment. *Id.* at 880. Here, by contrast, petitioner has failed to show that any similarly-situated carrier has been treated differently by the agency.

Inc. v. *United States*, 529 F.2d 679, 682 (C.A. 1); *Artus Trucking Co., Inc.* v. *Interstate Commerce Commission*, 377 F. Supp. 1224, 1228 (E.D. N.Y.). As the court of appeals pointed out, in view of the fact that petitioner was no longer conducting operations through the gateways at issue, "[t]he Commission was obviously justified in requiring evidence that [the carrier] would be able to attract shippers—new ones, old customers regained or both" (Pet. App. 6a n.9).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MARK L. EVANS,
General Counsel,

FREDERICK W. READ, III,
Associate General Counsel,

L. MARIE GUILLORY,
Attorney,
Interstate Commerce Commission.

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[5] Petitioner's assertion that the gateway elimination rules reduce competition contrary to the national transportation policy (Pet. 13) is without merit. *Thompson Van Lines, Inc.* v. *United States*, 399 F. Supp. 1131 (D. D.C.), affirmed, 423 U.S. 1041.

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